

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1009

To be argued by
JOHN TIMBERS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1009

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHANNES PRESCOTT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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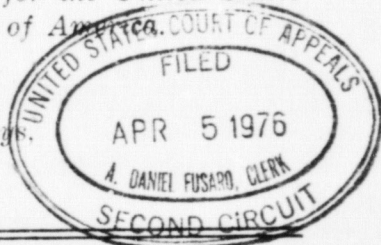


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UNITED STATES OF AMERICA,

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JOHANNES PRESCOTT,

Defendant-Appellant.

**BRIEF AND APPENDIX FOR THE UNITED STATES
OF AMERICA**

Preliminary Statement

Johannes Prescott appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 10, 1975, following his guilty plea before the Honorable Lloyd F. MacMahon, United States District Judge.

Indictment 75 Cr. 451, filed on May 6, 1975, charged Prescott and Jerry Braxton in Count One with having conspired to distribute Schedule II narcotic drug controlled substances in violation of Title 21, United States Code, Section 846. Count Two charged that, on July 6, 1974, Prescott distributed 57.50 grams of cocaine in violation of Title 21, United States Code, Section 841 and Title 18, United States Code, Section 2. Count Three

charged Prescott with having distributed, two days later, on July 28, 1974, 24.67 grams of cocaine, in violation of Title 21, United States Code, Section 841 and Title 18, United States Code, Section 2. In Count Six Prescott, who had previously been convicted of a felony, was charged with having possessed a firearm in violation of Title 18, United States Code, Section 922(g).*

Trial was scheduled for May 27, 1975. On that day Prescott withdrew his previously entered plea of not guilty and pled guilty to Count Two of the indictment. On July 14, 1975 Judge MacMahon sentenced Prescott to five years imprisonment, to be followed by a three-year special parole term. Counts One, Three and Six were dismissed with the Government's consent.

Prescott filed a Notice of Appeal. While the appeal was pending, Prescott filed a motion in the District Court to vacate his sentence as illegally imposed on the ground that his pre-sentence report had not been completed at the time of sentence. The appeal was withdrawn, and the motion to vacate the sentence was granted. Prescott was then resentenced on December 10, 1975. On that date, Judge MacMahon again sentenced Prescott to five years imprisonment, to be followed by a three year special parole term.

* A second defendant, Jerry Braxton, was also charged in Counts One, Two and Three. In Count Four, Braxton, but not Prescott, was charged with distributing cocaine in violation of Title 18, United States Code, Section 841. In Count Five, Braxton, but not Prescott, was charged with unlawfully carrying a firearm during the commission of a felony, in violation of Title 18, United States Code, Section 924(c)(2).

Braxton pled guilty to Counts One and Two and was sentenced to five years imprisonment. His conviction was later affirmed by this Court. (Dkt. No. 75-1281).

Statement of Facts

During the *voir dire* in conjunction with his plea of guilty to Count Two of the indictment, Prescott admitted that on July 26, 1974, he had introduced to co-defendant Braxton two men who, unbeknownst to Prescott and his co-defendant, were a Government agent and an informant. The introduction was made for the express purpose of facilitating the sale of 57.50 grams of cocaine. (Tr. of May 27, 1975, at 30).^{*} Prescott stated that in return for his efforts he received cocaine from Braxton. (*Id.*). He further admitted that he involved himself in this transaction knowingly, wilfully and intentionally. (*Id.* at 30-31).

Prescott's plea to Count Two of the instant indictment was not his first drug-related conviction. On February 27, 1973, Prescott was convicted of the felony of possession of dangerous drugs in the fourth degree in the New York Supreme Court, New York County. (See Appellant's Appendix "B", Count Six).

Prior to the imposition of sentence on December 10, 1975, Prescott's counsel addressed the Court. (Govt. App. at 1a).^{**} Counsel suggested that Prescott's role in this crime had been less significant than his co-defendant Braxton's. (*Id.*). Counsel further stated that her client had informed her that this offense was a "one-shot deal" and that he became involved only to support his drug addiction.^{***} (*Id.* at 1a-2a). In addition, counsel stated that Prescott was a devoted family man who had adjusted

^{*} In his brief Prescott erroneously states that the amount of cocaine involved was .57 grams. (App. Br. at 2).

^{**} The sentencing minutes, which are not included in Prescott's appendix, are reproduced in the appendix to this brief.

^{***} Prescott had suggested nothing of the sort at the time of his plea.

well to prison; that his crime involved a less dangerous drug than many others; and that a lengthy term of imprisonment would be unnecessary to rid him of his drug addiction. (*Id.* at 2a-3a).

The Court, in imposing a five year term of imprisonment,* noted that the fact that Prescott had involved himself in this crime to satisfy his drug habit made him no less a danger to the community; indeed, the Court observed that the defendant might well be a greater danger to the community because he was apparently unable to control his conduct. (*Id.* at 4a-5a).

The Court, focusing on the need to deter drug-related crimes and on the defendant's prior record, noted that

"the biggest problem in the field of criminal law that faces this city is narcotics. It spawns countless crimes, crimes of violence, every other kind of crime, and this is so whether the narcotics involved be heroin or cocaine; in either case, to support a habit such as yours, you are obliged to commit crime of some sort and your record shows it." (*Id.* at 5a).

ARGUMENT

POINT I

Prescott's Sentence Should Not Be Reversed.

Prescott argues that his five year sentence was excessive and should therefore be vacated. More specifically, he claims first that the trial judge based his sentence "on the incorrect belief that it would take appellant five

* Prescott's plea of guilty exposed him to maximum punishment of 15 years imprisonment, a \$25,000 fine and a mandatory special parole term of at least three years.

years to overcome his addiction" and second that the sentence "was imposed in total disregard of the constitutional requirements that criminal punishment not exceed the least restrictive alternative necessary to accomplish the desired goal." (P. at 9, 10). These claims are meritless.

There is not an iota of support in the record for Prescott's contention that Judge MacMahon intended to gauge the length of Prescott's sentence by the term needed to rid him of his drug dependency. While Prescott's counsel, to be sure, argued that the length of sentence should be determined by such a factor (Govt. App. at 3a), review of the sentencing minutes plainly shows that Judge MacMahon rejected this suggestion. Thus, the claim that Judge MacMahon imposed sentence based on an erroneous belief concerning the period necessary for Prescott's addiction to be cured is simply a red herring.

Prescott's second contention, that the punishment imposed exceeded the "least restrictive alternative necessary to accomplish the desired goal" proceeds from the same faulty premise which undermines his first argument. The "desired goal" of the District Judge's sentence was not, as Prescott would have it, simply to rid Prescott of his drug dependency. While rehabilitation of the defendant was doubtless a factor in the sentence, deterrence and retribution also played a part.

Once it is recognized that the "desired goal" encompassed a good deal more than the rather clinical function of forcing the defendant to go cold turkey, Prescott's contention becomes nothing more than a plea to be relieved of an excessive sentence.

The settled law in this Circuit is that:

"... absent reliance on improper considerations, see *United States v. Mitchell*, 392 F.2d 214, 217

(2d Cir. 1968) (Kaufman, J., concurring), or materially incorrect information, see *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970) a sentence within statutory limits is not reviewable. See, e.g., *United States v. Brown*, 479 F.2d 1170; *United States v. McCord*, 460 F.2d 17, 18-19 (2d Cir. 1972); *United States v. Dzauak*, 441 F.2d 212, 218 (2d Cir.), cert. denied 404 U.S. 883 (1971)." *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973).

See also *Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Gore v. United States*, 357 U.S. 386, 393 (1958); *United States v. Glazer*, Dkt. No. 75-1213, slip op. 2201, 2213 (2d Cir., Mar. 1, 1976); *United States v. Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975). The five year sentence imposed here was well within the fifteen-year statutory maximum and certainly was not inappropriate for a second drug offender.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
 Southern District of New York,
 Attorney for the United States
 of America.*

JOHN TIMBERS,
 LAWRENCE B. PEDOWITZ,
*Assistant United States Attorneys,
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**Transcript of the December 10, 1975
Court Proceedings (Prescott Sentence)**

The Clerk: United States against Prescott for sentencing.

Mr. Timbers: Ready for the Government.

Ms. Ginsberg: Ready for the defendant.

* * * * *

The Court: . . . All right, we will proceed with Prescott. I will hear the Government.

Mr. Timbers: The Government has nothing to add to the pre-sentence report, your Honor.

The Court: I will hear defense counsel.

Ms. Ginsberg: Your Honor, my name is Sheila Ginsberg. I am with the Legal Aid Society, assigned to represent Mr. Prescott on the sentence. The sentence is before your Honor today, your Honor having granted the defendant's motion to vacate the original sentence which was imposed on July 14th of this year. Mr. Prescott pleaded guilty on May 27, 1975 to one count of aiding and abetting the sale of two ounces of cocaine. The pre-sentence report and the facts elicited at the time of the guilty plea established that Mr. Prescott's involvement in this crime was tangential and minimal at most.

The facts indicate that Mr. Prescott introduced the undercover officers to his co-defendant, Jerry Braxton. The facts again establish, and I think the Government's version of the facts which is included in the pre-sentence report, support the conclusion that Jerry Braxton, the co-defendant, was the most culpable in this situation. Mr. Braxton was involved in an ongoing drug operation, whereas Mr. Prescott's involvement in this was really a one-shot deal. Mr. Prescott informs me that prior to this

*Transcript of the December 10, 1975 Court Proceedings
(Prescott Sentence)*

one sale in July of 1974, he had not been in contact with Mr. Braxton and that his involvement in this case was solely to enable him to support his own drug addiction.

It is important to point out to your Honor that for his involvement in this crime he received no financial remuneration but rather was given a small sample of cocaine which was only for his personal use and not for resale.

At the time of this crime, Mr. Prescott was addicted to the use of heroin and cocaine, as he had been since 1969.

I think that this crime, his involvement with Mr. Braxton, I think that his prior conviction in the State Court is a product, is clearly a product of his drug addiction and is not the result of any evil intent on his part, but rather the product of this sickness.

Mr. Prescott is presently thirty years of age. He is married and has two children. I have spoken with Mr. MacShane, who was his case worker at Springfield, where Mr. Prescott was incarcerated pursuant to your Honor's original sentence. Mr. MacShane tells me that Mr. Prescott adjusted to prison life and that his performance was at all times satisfactory. He tells me, and I have concluded the same from my conversations with Mr. Prescott, that Mr. Prescott is a devoted family man and primarily concerned with his wife and children, and that in Mr. MacShane's conversations with Mr. Prescott the one overriding concern that Mr. Prescott had was that he was incarcerated in Springfield so far away from New York, and because of this distance was not able to communicate, except by letters, with his family.

*Transcript of the December 10, 1975 Court Proceedings
(Prescott Sentence)*

I think on the matter of sentence in this case, your Honor, I am aware, as I know Mr. Prescott is, that his conviction here is for a serious crime, and there is no attempt here to minimize that, but the crime does involve cocaine, and recently there have been studies which have concluded that cocaine is a less serious or dangerous drug than amphetamines or barbiturates and I refer specifically to an article in the New York Times——

The Court: What, am I governed by the New York Times or findings of Congress?

Ms. Ginsberg: Certainly not, your Honor, and I don't mean to indicate that you are, but I just wanted to point out there is a recent school of thought that does not find that cocaine is as dangerous a drug as others that are for sale.

I would just like to point out, your Honor, in conclusion, that Mr. Prescott's involvement in this crime, I think, was a product of his own addiction.

Should your Honor find that some period of incarceration is necessary to help Mr. Prescott get over this drug, personal drug problem that he has, I would submit to your Honor most respectfully that it does not require a long period of incarceration. Mr. Prescott has been in prison for six months, and has performed satisfactorily.

Of course, your Honor is required by the statute to impose on Mr. Prescott a three-year special parole term, and should Mr. Prescott not be capable of functioning within the law and in accordance with the parole requirements, this Court has the power, of course, to revoke that parole.

*Transcript of the December 10, 1975 Court Proceedings
(Prescott Sentence)*

I would ask the Court in light of these facts to be as lenient as possible.

The Court: Thank you, Miss Ginsberg.

Mr. Prescott, do you have anything to say for yourself before the Court pronounces sentence?

The Defendant: Your Honor, everything that was said, Miss Ginsberg covered it all.

The Court: Well, Miss Ginsberg, in her very able plea in your behalf, hasn't told me anything of any significance that I did not know at the time I imposed your original sentence. While at that time the Court did not have the benefit of a written pre-sentence report, I had very carefully interrogated you at the time you pleaded guilty. I had also read the pre-sentence report which was typed on your co-defendant, Mr. Braxton, which sets forth the nature of your crime in detail.

I knew from your plea of guilty that you had children; I knew you were thirty years of age; and I knew what your occupation was.

I knew that you were a drug addict and I knew that you were supplying customers to Braxton. And I didn't need to know much of anything more, and unfortunately, due to summer vacations and a slip up in the clerk's office the pre-sentence report was not available in written form on the morning last July 14th, when your sentence was imposed. And it is not entirely clear to me whether, in sentencing you without reading the written report, perhaps the Court sentenced you in an illegal manner, although that is by no means clear. But to make assurance doubly sure I have called you back here for re-sentencing today, and I fully agree with Miss Ginsberg

*Transcript of the December 10, 1975 Court Proceedings
(Prescott Sentence)*

that it is perfectly plain to anyone that your involvement in this crime was to satisfy your own habit. But that makes it no less, no less at all a danger to the community. Quite the contrary; it is people who are addict pushers, addict solicitors in sales of narcotics who furnish the grist for this rotten business. It is a built-in sales organization, and to me you are every bit as much of a danger to the community as someone who sells it for money. In fact, you may be more so because you probably can't help yourself whereas they might.

And in imposing a five-year sentence, the Court was quite mindful of the biggest problem in the field of criminal law that faces this city is narcotics. It spawns countless crimes, crimes of violence, every other kind of crime, and that is so whether the narcotic involved be heroin or cocaine; in either case, to support a habit such as yours, you are obliged to commit crime of some sort, and your record shows it.

Accordingly, the Court now sentences you to five years on Count 2 pursuant to the provisions of Title 21, Section 841, United States Code, the defendant is placed on special parole for a period of three years, to commence upon expiration of confinement.

The other counts have already been dismissed.

Mr. Timbers: May the writ be satisfied, your Honor?

The Court: Yes. Do you have the writ?

[Handed to Court.]

AFFIDAVIT OF MAILING

State of New York)
 : ss.:
County of New York)

John Timbers, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 5th day of April, 1975
he served a copy of the within Brief
by placing the same in a properly postpaid franked
envelope addressed: Shelia Ginsberg

The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square
New York N.Y. 10007

And deponent further says that he sealed the said en-
velope and placed the same in the mail drop for
mailing near the United States Courthouse, Foley
Square, Borough of Manhattan, City of New York.

John Timbers

Sworn to before me this

5th day of

April, 1976

Jeanette Ann Grayeb
JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977